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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE STATE OF CALIFORNIA; THE STATE OF CONNECTICUT; THE STATE OF DELAWARE; THE DISTRICT OF COLUMBIA; THE STATE OF ILLINOIS; THE STATE OF IOWA; THE COMMONWEALTH OF KENTUCKY; THE STATE OF MARYLAND; THE COMMONWEALTH OF MASSACHUSETTS; THE STATE OF MINNESOTA; THE STATE OF NEW MEXICO; THE STATE OF NEW YORK; THE STATE OF NORTH CAROLINA; THE STATE OF OREGON; THE COMMONWEALTH OF PENNSYLVANIA; THE STATE OF RHODE ISLAND; THE STATE OF VERMONT; THE COMMONWEALTH OF VIRGINIA; and THE STATE OF WASHINGTON,

Plaintiffs,

v.

DONALD J. TRUMP, President of the United States; ERIC D. HARGAN, Acting Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; STEVEN T. MNUCHIN, Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY; and DOES 1-20,

Defendants.

Case No. 3:17-cv-05895-VC

PLAINTIFFS' REPLY IN SUPPORT OF EX PARTE MOTION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

Date:	October 23, 2017
Time:	1:00 p.m.
Courtroom:	8, 19th Floor
Judge:	Hon. Vince Chhabria
Trial Date:	None Set
Action Filed:	October 13, 2017

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INTRODUCTION

Nine days ago, the President abruptly announced that he would no longer make a payment critical to the proper operation of Patient Protection and Affordable Care Act. That decision was timed just eight days before the next payments were due, and less than three weeks before open enrollment begins. It has caused health insurance premiums to spike and destabilized health insurance markets, and will soon create substantial confusion among consumers. It is predicated on a complete reversal of the legal position that the Executive Branch has maintained and acted on for nearly four years, including eight months under the new Administration. And it was motivated by the President's desire to "dismantle[]" the ACA.[1] In response to this illegal and arbitrary act, the plaintiff States filed this suit to protect their interests and those of their residents. They also asked for immediate relief, to prevent the imminent and irreparable harm that will occur should the Administration's decision take effect.

Defendants oppose that request but offer no persuasive reason why interim injunctive relief should not be granted. On the merits, Defendants do not dispute that the ACA *requires* them to make CSR payments; they argue instead that the law does not *authorize* them to make those payments. Defendants advance a series of hyper-technical arguments in support of their unduly narrow construction of the ACA, but each lacks merit and conflicts with the guidance from the U.S. Supreme Court in *King v. Burwell*. And nowhere do Defendants provide a plausible explanation for why Congress would have failed to include a permanent appropriation for CSRs when it adopted the ACA. Nor could they: a correct understanding of Congress's legislative plan demonstrates that a permanent appropriation for these funds is necessary to achieve the Act's goals of making health care more accessible and affordable. Finally, Defendants' threshold objections to the States' suit are equally meritless. The States are not barred from seeking emergency relief here because they are also parties to the related litigation in *House of Representatives v. Hargan*, D.C. Circuit Case No. 16-5202. And the States plainly have Article III standing to bring this lawsuit; indeed, the D.C. Circuit has already drawn that conclusion.

[1] https://twitter.com/realDonaldTrump/status/919009334016856065.

The Defendants' new understanding of the ACA will also irreparably—and imminently—harm the States. Defendants' sudden reversal has caused health insurance premiums across the country to skyrocket, in some states by as much as 30%. Consumers will begin shopping for insurance at those unnecessarily inflated rates when open enrollment begins on November 1. Many will be unable to afford these higher premiums, and will abandon the health insurance market altogether. That will harm not only the States' residents but the States themselves, which will be forced to spend billions more on health care costs when these uninsured residents seek emergency care at State-funded facilities. Moreover, relief now will ensure that insurance companies will not seek to withdraw from the Exchanges created by the Act, a consequence of the Administration's action that could leave many Americans without access to high-quality, affordable health care. The balance of the equities also tips sharply in the States' favor, as an injunction will *save* the Executive Branch money. And an order preserving the status quo will plainly serve the public interest, because it will ensure that millions of Americans will continue to have access to affordable healthcare as the framers of the ACA intended.

The purpose of interim injunctive relief is "not to conclusively determine the rights of the parties," but instead to "balance the equities as litigation moves forward." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). Crafting an injunction is an "exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Id.* Here, the equities strongly favor granting the States' motion for a preliminary injunction. The President's rash decision threatens grave and imminent harm to the States and the residents. It was made at a moment's notice, and at a time that is particularly damaging to the States' health care markets. Indeed, the President stated as much the morning after ("I knocked out the CSRs … I cut off the gravy train … Obamacare is finished. It's dead…").[2] Interim relief will provide a modicum of stability to an otherwise chaotic situation, while the Court considers the merits of this dispute in an orderly fashion.

[2] https://www.whitehouse.gov/the-press-office/2017/10/16/remarks-president-trumpcabinet-meeting.

ARGUMENT

I. THE STATES ARE LIKELY TO SUCCEED ON THE MERITS

A. The Text, Structure, and Design of the ACA Demonstrate that Congress Permanently Appropriated Funds for CSRs

As Plaintiffs argued in their motion, the text, structure, and design of the ACA demonstrate that Congress permanently appropriated funds for CSRs. Mot. 9-13.

Defendants offer several arguments in response, none of which withstand scrutiny. Opp. 16-24. Defendants first assert that 31 U.S.C. § 1324(b)'s "explicit appropriation for 'refunds due from … § 36B' … cannot be read to silently encompass CSR payments to issuers that are separately authorized by 42 U.S.C. § 18071." Opp. 18. But Defendants overlook that the statutory text of section 18071 *expressly references* section 36B's refundable credit. Section 18071 states that "[n]o cost-sharing reduction shall be allowed under this section with respect to coverage for any month unless the month is a coverage month with respect to which a credit is allowed to the insured (or any applicable taxpayer on behalf of the insured) *under section 36B* of such title." 42 U.S.C. § 18071(f)(2) (emphasis added). In other words, only beneficiaries entitled to a tax credit "under section 36B" in any given month qualify for cost-sharing reductions during that month. Because eligibility for a premium tax credit "under section 36B" is a statutory *precondition* for receipt of CSRs, payments of CSRs are necessarily "refunds due from" section 36B in precisely the same manner as premium tax credits are due "from" that provision.

This conclusion is underscored by the fact that the ACA treats premium tax credits and CSR payments as interrelated components of a single, integrated, and permanently appropriated subsidy program in all material respects. *See* 42 U.S.C. § 18082. Eligibility for both are determined at the same time, through the same process, and by the same individual. *Id*. at (a)(1). Advance payments of both similarly occur at the same time, through the same process, are paid by the same person, and payments flow to the same entities (insurers). *Id*. at (c). And advance payments of both serve the same statutory purpose: to reduce premiums payable by eligible individuals. *Id*. at (a)(3). Indeed, Defendants concede (as they must) that § 18082 "authorize[s] advance payment to issuers under both programs," but claim that § 18082 "addresses each

program separately in a distinct subsection" and therefore keeps the two programs "distinct." Opp. 19-20 (comparing § 18082(c)(2) with § 18082(c)(3)). In fact, § 18082(c) is titled "payment of premium tax credits *and* cost-sharing reductions," and both of the referenced subsections use the identical "shall make" language with respect to payments for both. 42 U.S.C. § 18082(c).

Moreover, multiple other provisions in § 18082 discuss premium tax credits and CSRs in the same subsection. For example, § 18082(a)(3) states that "the Secretary of the Treasury makes advance payments of such *credit or reductions* to the issuers of the qualified health plans in order to reduce the premiums payable by individuals eligible for such *credit*." Emphases added. Not only does this subsection discuss premium tax credits and cost-sharing reductions together, but it refers to both as "credit," *id.*, which reinforces that section 36B's "refundable credit" includes both components of the ACA's subsidy program. Far from taking "great care to keep the two programs distinct," Opp. 20, both § 18082—and the ACA as a whole—repeatedly and consistently speak of premium tax credits and CSRs in the same statutory breath. They are directly linked no fewer than 45 separate times in the ACA. *See* Mot. 11, n.18.

Defendants also contend that "[t]here does not appear to be any evidence that Congress, in amending § 1324, intended to create an implicit and open-ended appropriation for all programs related in any way to § 36B tax credits (such as CSR payments)." Opp. 20. That too is incorrect. In addition to the textual and structural arguments outlined above, there are at least three other bases for concluding that Congress intended to permanently appropriate the funds for CSRs. First, Congress omitted from the cost-sharing reduction provisions the language that it ordinarily uses when it subjects payments to the annual appropriations process. In such cases, Congress enacts an "authorization of appropriations" provision, as it did in dozens of other provisions scattered throughout the ACA. *See* Pub. L. No. 111-148, § 2705(f), 124 Stat. 119, 325 (2010) ("There are authorized to be appropriated such sums as are necessary to carry out this section.").[3] The absence of such "annual appropriations" language is evidence that Congress believed that

[3] *See*, *e.g.*, ACA §§ 1002, 2706(e), 3013(c), 2015, 2501, 3504(b), 3505(a), 3505(b), 3506, 3509(b), 3509(e), 3509(f), 3509(g), 3511, 4003(a), 4003(b), 4004(j), 4101(b), 4102(a), 4102(c), 4102(d)(1)(C), 4102(d)(4), 4201(f), 4202(a)(5), 4204(b), 4206, 4302(a), 4304, 4305(a), 4305(c), 5101(h), 5102(e), 5103(a)(3), 5203, 5204, 5206(b), 5207, 5208(b), 5210, 5301, 5302, 5303, 5304, 5305(a), 5306(a), 5307(a), 5309(b).

CSRs were permanently appropriated. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) (*NFIB*) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.").

Defendants identify only one example in which the federal government did not fund an entitlement for a short period of time—and that action resulted in immediate litigation that was dismissed as moot once Congress made the appropriation. *Smith v. U.S. Dept' of Agriculture*, 2016 WL 4179786 (N.D. Cal. Aug. 8, 2016). Defendants also rely on an Executive Branch action that occurred years after the Act became law. Opp at 24. But "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 241-42 (2011) (citations omitted).

Notably, the CBO treats the CSR payments as a mandatory entitlement and includes these payments as part of the federal spending baseline with other mandatory spending, including the premium tax credits.[4] The President's own FY 2018 Budget not only treats the cost-sharing reduction payments as direct spending, mandatory spending for an entitlement, the President's Office of Management and Budget funds the cost-sharing reduction payments out of the same account number as the advance premium tax credits.[5] Defendants' opposition brief is notably silent regarding the justification—and funding source—for the past 8 months of CSR payments. In short, both the federal scorekeepers, the CBO and OMB, treat the cost-sharing reduction payments as a mandatory payment funded through the ACA.

Second, other ACA provisions would make no sense if cost-sharing reduction payments were not permanently funded. For example, the ACA prohibits the use of CSRs for abortion services. 42 U.S.C. § 18023(b)(2)(A)(ii). But if CSR payments were subject to annual appropriations, a different federal law—the Hyde Amendment—would indisputably bar CSRs from being used for abortion services. *See, e.g.*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-176, Div. H, §§ 506-07, 128 Stat. 5, 409 (2014). In other words, this abortion provision would be redundant and unnecessary *unless* CSRs were permanently funded.

[4] https://www.cbo.gov/about/products/budget-economic-data#3.
[5] https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/tre.pdf.

Third, Congress could not possibly have intended for CSR reimbursement payments—but not premium tax credits—to be subject to annual appropriations because paying for just the tax credits will cost the federal government hundreds of billions of dollars more over the next decade than subsidizing both. *See* Mot. 12.

B. Defendants' Attempts to Distinguish *King* Are Unpersuasive

The conclusion that Congress permanently appropriated funds for CSRs is bolstered by the Supreme Court's decision in *King v. Burwell*, 135 S. Ct. 2480 (2015). In that case, the Supreme Court rejected a hyper-technical reading of the ACA because it was fundamentally incompatible with statutory scheme and congressional intent. The plaintiffs in *King* argued that the ACA's premium tax credits were only available to residents who lived in States that ran their own Exchange, and not in States with federally-run Exchanges. *Id.* at 2487. The statute provided that tax credits were allowed when an eligible resident enrolled in an insurance plan made available through an "'Exchange *established by the State*.'" *Id.* (quoting 26 U.S.C. §§ 36B(b)-(c)). Because federally-run Exchanges were not "established by the State," the plaintiffs argued, tax credits were not available to individuals who signed up for health insurance through them. *Id.*

The Court rejected this argument. *King*, 135 S. Ct. at 2496. It acknowledged that the plaintiffs' "arguments about the plain meaning" of the statute were "strong." *Id*. at 2495. But it concluded that their reading of the law was incorrect, and that the "context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase." 135 S. Ct. at 2495. The Court emphasized that "a fair reading of legislation demands a fair understanding of the legislative plan," which was to "improve health insurance markets, not to destroy them." *Id*. at 2496. Because the plaintiffs' reading of the ACA would have produced a "'substantive effect that is [in]compatible with the rest of the law,'" the Court rejected it. *Id.* at 2492 (citation omitted). As is often the case, the meaning of the ACA's text "'only become[s] evident when placed in context.'" *Id.* at 2489.

Here too, the statutory context demonstrates that when it amended Section 1324, Congress created a permanent appropriation for both premium tax credits and CSR payments. As in *King*, reading the ACA to *not* include a permanent appropriation for CSRs would be fundamentally

inconsistent with the ACA's goal of establishing a stable, market-based framework to make healthcare more accessible and affordable for millions of working Americans. Defendants' claim that it was "entirely reasonable" for Congress to have assumed that future Congresses would make the discretionary appropriations necessary to fund CSRs, Opp. 24, willfully ignores the realities of the insurance industry and of the annual appropriations process in Congress.

The ACA requires insurers to front billions of dollars in CSRs, and they would not be willing to do so if they did not know they would recoup that money. Insurers that offer coverage through the Exchanges created by the ACA must include at least one healthcare plan that reduces cost-sharing expenses for eligible individuals. 42 U.S.C. §§ 18021(a)(1), 18022(a)(2), 18071(a)-(c). The ACA provides no exception from this mandate; and insurers are required to cover the cost of the reductions provided to beneficiaries, even if (for example) the federal government fails to reimburse them. *Id.* § 18071(a)-(c). Without a permanent appropriation, the Act would impose a mandatory expense on participating insurers without a guaranteed mechanism to recoup it.

It is "implausible that Congress meant the Act to operate in this manner." *King*, 135 S. Ct. at 2494. Knowing whether billions of dollars in CSR costs will be reimbursed is—unsurprisingly—a central component of insurers' decision to offer plans through the Exchanges, and at what cost. Eyles Decl. ¶ 8. Absent the assurance of a permanent appropriation, many insurers would preemptively raise premiums to offset the mandatory CSR costs that they would later incur. Others would opt not to participate in the Exchanges at all. Both responses would undermine the ACA's core purposes: to "increase the number of Americans covered by health insurance and decrease the cost of health care." *NFIB*, 132 S. Ct. at 2580.

Moreover—and contrary to Defendants' suggestion, Opp. 24—the possibility of discretionary funding during Congress's annual appropriations process does not supply a plausible alternative of what Congress might have intended. For each year, insurers must decide whether to submit applications to participate in Exchanges, and, if so, where to set propose premium rates sometime between April and July.[6] Between 1977 and 2016, however, Congress

[6] *See* Wick, 2017 QHP Rate Filing—Key Dates (Apr. 18, 2016); *see also* Centers for Medicare & Medicaid Services, *Bulletin* 2 (Apr. 13, 2017) (CMS Bulletin).

did not finalize its regular appropriations until after October 1 on all but four occasions.[7] Thus, absent a permanent appropriation, insurers would have to decide whether to offer coverage through the Exchanges and, if so, where to set premiums, several months before they would know whether the federal government had the authority to reimburse them for CSRs. Congress could not have intended the ACA to operate in this manner. *King*, 135 S. Ct. at 2494.

Thus, contrary to Defendants' assertions, interpreting the ACA as having permanently appropriated only one of the two intertwined subsidy components would be internally inconsistent, would be fundamentally incompatible with the core purposes of the statute, and would cost the federal government (and, ultimately, the taxpayers) vastly greater sums of money. As the Supreme Court did in *King*, this Court should reject a narrow reading of a single statutory phrase that is unfaithful to the broader context, structure, and purpose of the statute as a whole.

C. The Decision to Stop CSR Payments Violates the Take Care Clause

The States are also likely to succeed on their Take Care Clause cause of action. Mot. 13-16. This argument does not "collapse into" the States' statutory argument. Opp. 15. The Take Care Clause cabins the Executive's "authority to disregard federal statutes." *In re Aiken County*, 725 F.3d 255, 257 (D.C. Cir. 2013). But it also prohibits the President from taking actions that are specifically intended to prevent a law from functioning as Congress intended. And the President's own words and actions make clear that the decision to stop CSR payments is not based on a good-faith reading of the statute, but is instead part of a politically-driven strategy to undermine the ACA because the current Administration disagrees with its objectives. *See* Mot. 15-16 (colleting examples). Allowing the Executive to undermine an Act of Congress in this way would "deal a severe blow to the Constitution's separation of powers." *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014).

D. Defendants' Claim-Splitting Argument Lacks Merit

The States are not barred from seeking emergency relief here because they are also parties in *United States House of Representatives v. Hargan*, D.C. Circuit Case No. 16-5202. Opp. 8-11.

[7] Saturno & Tollestrup, *Continuing Resolutions: Overview of Components and Recent Practices* 10 (2016), https://fas.org/sgp/crs/misc/R42647.pdf.

Hargan is an appeal of a district court order entering an injunction—presently stayed—*prohibiting* the federal defendants from making CSR payments. This case, in contrast, seeks an order *requiring* the federal defendants to make CSR payments. Moreover, *Hargan* involves not only the statutory question presented to this case, but also the substantial issue of whether the House plaintiffs had standing to bring that suit at all. *See* Brief for Appellants at 19-38, *U.S. House of Representatives v. Hargan*, No. 16-5202 (D.C. Cir. Oct. 24, 2016), Doc. #1642568. The States intervened when it became clear that the federal defendants could not be relied on to continue to defend the correct resolution of the statutory question. Before the D.C. Circuit can reach that question, however, it must first reject the States' position—shared by the Executive Branch—that the entire suit fails for lack of standing. *See* Opp. 8, n.5. And while prevailing on standing grounds would provide the States with complete relief from the harmful effects of the district court's injunction in that case, it would not remedy the harm caused by the federal defendants' new, unilateral decision to stop making CSR payments. To address that harm, the States require a different form of relief: a judicial declaration that the ACA *requires* the federal defendants to make those payments without further specific appropriations.

The rule against claim splitting is therefore inapposite. Opp. 8-11. That doctrine generally requires a "*plaintiff* to assert all of its causes of action arising from a common set of facts in one lawsuit." *Katz v. Gerardi*, 655 F.3d 1212, 1217 (10th Cir. 2011) (emphasis added). It is meant to discourage plaintiffs from filing claims that arise out of the same facts in different lawsuits. *Id.* And although a claim-splitting challenge may be raised in a second suit before the first one is final, *see* Opp. 9, it applies only if the first suit, when complete, "*would* preclude the second suit." *Katz*, 655 F.3d at 1218 (emphasis added). That is not the situation here. The States are not plaintiffs in *Hargan*.[8] They did not "originally [seek] relief" in that forum, nor "select[] to press their claims" there. Opp. 10, 11. Instead, they intervened—as defendants, and on appeal—because doing so was necessary to protect their interests. Indeed, intervention was the only way for the States to ensure that the federal parties could not move to dismiss the appeal without also

[8] Defendants identify no case in which the rule against claim splitting has been applied against a party in one suit because it was a *defendant* in another.

seeking vacatur of the district court's injunction—a move that would have preserved an unreviewed ruling as a potential bar to future litigation. And because of the substantial standing issue in *Hargan*, there is no reason to assume that that case will result in a decision that "would preclude" this suit. *Katz*, 655 F.3d at 1218; *see also Adams v. California Dep't of Health Servs.*, 487 F.3d 684, 689 (9th Cir. 2007), *overruled on other grounds by Taylor v. Sturgell*, 553 U.S. 880 (2008) (claim splitting applies to suits where the "'available relief" does not "'significantly differ'") (citation omitted). Indeed, Defendants are ill positioned to argue that the States should have to litigate the statutory issue in *Hargan* when they agree that the D.C. Circuit actually should not reach the issue in that case—and where they have delayed resolution of that appeal for months.

This suit is thus an entirely proper vehicle, and this Court an entirely proper forum, for the States to seek emergency injunctive relief. Certainly the D.C. Circuit could also enter an interim order, as a means of preserving the status quo while it considers the issues before it. But that relief would be tenuous, clouded by the States' own assertion—shared by the Executive Branch—that neither the D.C. District Court nor the D.C. Circuit have jurisdiction consider the merits due to the House's lack of standing.[9] In this case, unlike in *Hargan*, the statutory issue *must* be reached. In this case the factual record and legal arguments address the current reality, in which the federal defendants have reversed their previous position and stopped making CSR payments. In this case, the preliminary relief the States request would exactly match the permanent relief that would be entered if the States prevail on the merits. And this case is presently pending before a district court, which is the ordinary forum in which to seek prompt interim equitable relief. *Cf.* Fed. R. App. Proc. 8(a)(2)(A) (equitable relief pending appeal normally sought in district court in first instance). Under these circumstances, this Court can and should act on the

[9] Because there is a strong possibility that the States and the federal defendants will prevail on standing grounds in *Hargan*, requiring the States to litigate this case in the D.C. Circuit would undercut one of the core purposes of the claim-splitting doctrine: the "'conserv[ation of] judicial resources.'" *Feminist Women's Health Ctr. v. Codispoti*, 63 F.3d 863, 869 (9th Cir. 1995) (citation omitted).

States' request without regard to whether any similar relief might be sought or granted in the overlapping, but quite distinct, proceedings in *Hargan*.

E. The Plaintiff States Have Article III Standing

The States also have Article III standing. Opp. 11-14. In response to the decision to terminate CSR payments, insurers will (and in many States already have) raise premiums. Brown Decl. ¶¶ 3, 7, 11; Bertko Decl. ¶ 6; Second Keen Decl. ¶ 3; Mendelsohn Decl. ¶ 14; Kreidler Decl. ¶ 14. Rising premiums, in turn, will force more state residents to forgo health insurance. McLeod Decl. ¶ 6; de la Rocha Letter 1-2; Kreidler Decl. ¶¶ 16, 20-23; Frigand Decl. ¶¶ 5-7; Vullo Decl. ¶ 8; Frescatore Decl. ¶¶ 24, 27, 30; Wadleigh Decl. ¶ 14. The decision to stop CSR payments will also lead to a rise in the number of uninsured residents because it will cause some insurers to stop offering plans through the Exchanges. Corlette Decl. ¶ 6; Reyes Decl. ¶ 10; Eyles Decl. ¶¶ 9, 17. Fewer insurers will lead to fewer affordable coverage choices, and ultimately more uninsured residents. Corlette Decl. ¶¶ 8-9; Congressional Budget Office, *The Effects of Terminating Payments for Cost-Sharing Reductions*, August 2017 (CBO Report) at 7. The increase in the number of uninsured, in turn, will impose a direct financial burden on the States, who must ultimately must cover the cost of care when the uninsured seek treatment at state-funded facilities. McLeod Decl. ¶¶ 7-9; Wadleigh Decl. ¶ 16; Rattay Decl. ¶¶ 4-6; de la Rocha Letter 1-2; CBO Report 7; Wynn Decl. ¶ 6; Cantwell Decl. ¶ 3; Reyes Decl. ¶ 9; Billups Decl ¶ 4.

The Administration's decision thus imposes a concrete, particularized, and imminent injury on the States. That injury stems directly from the Administration's improper interpretation of the ACA, and would be redressed by a favorable ruling from this Court. The States have thus established Article III standing. *See Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001). Indeed, the D.C. Circuit has already drawn this conclusion: The termination of CSR payments will lead "directly and imminently" to an increase in the cost of insurance, which in turn will "increase the number of uninsured individuals for whom the States would have to provide health care." Order, *United States House of Representatives v. Price*, Case No. 16-5202, 2017 WL 3271445, at *1 (D.C. Cir. Aug. 1, 2017). And state-funded hospitals will also suffer financially when they are "unable to recoup costs from uninsured, indigent patients" whom they

must care for under state and federal law. *Id.*; *see also* 42 U.S.C. § 1395dd (state hospitals must provide emergency care regardless of patient's ability to pay); Cal. Welf. & Inst. Code §§ 17000, 17600 (similar); N.Y. Public Health Law § 2807-k (similar). The causal link between the Defendants' actions and the harm to the States is "plausible, directly foreseeable, [and] imminent." Order, *Price*, 2017 WL 3271445, at *1; *see also Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) ("The risk of catastrophic harm, though remote, is nevertheless real.").

Defendants "disagree" with the D.C. Circuit's decision, but provide no persuasive argument for drawing a different conclusion. Opp. 14, n.10. They do not dispute that the decision to stop CSR payments will lead to a substantial rise in premiums for millions of Americans. Instead, they point to a recent Congressional Budget Office projection that "[m]ost" people's premiums would remain similar over "the next decade" if CSR payments stop. Opp. 12 (quoting CBO Report at 2). But they leave out the CBO's most important conclusion: that *one million* residents will lose insurance in 2018 if CSR payments stop. CBO Report at 14. Defendants' assertion that insurers will not withdraw from the Exchanges now that CSR payments have stopped, *see* Opp. 12, similarly ignores the fact that several insurers decided not to participate in the Exchanges during 2018 simply because they did not know whether CSR payments would be made next year. *See* Mot. 20 (collecting examples). Finally, Defendants offer no response to the bevy of evidence introduced by the States demonstrating that a rise in the uninsured rate will lead to billions of dollars in additional state spending on health care. Cantwell Decl. ¶ 3; Wynn Decl. ¶¶ 7-11; Frescatore Decl. ¶34; Billups Decl. ¶ 4; Rattay Decl. ¶¶ 4-5.

The increased administrative burden that the Administration's decision imposes on the States also gives them Article III standing to bring this suit. Compl. ¶¶ 74-78. That harm is not, as Defendants contend, a mere "generalized grievance[] about the conduct of government." Opp. 13 (citation and quotation marks omitted). It is instead a direct injury to the States' regulatory programs and their fiscs. The States play a critical role in delivering plans offered through the Exchanges. State regulators review proposed premium rates to evaluate whether they are "actuarially sound," Cal. Health & Safety Code § 1385.06(a), and whether proposed rate increases are "unjustified," *id.* § 1385.11(a), or not "excessive, inadequate, unfairly

discriminatory, destructive of competition or detrimental to the solvency of insurers," N.Y. Insurance Law § 2303. *See also* 18 Del. Code § 2503; Md. Code, Ins. § 11-603(c)(2)(i). Similarly, the ACA relies on regulators in most States to annually review "unreasonable increases in premiums" and compel insurers to justify such increases before they go into effect. 42 U.S.C. § 300gg-94(a)(1); 45 C.F.R. §§ 154.200-154.230, 154.301. And States review plans offered on their Exchanges to determine, among other things, whether they meet requirements such as covering essential health benefits and paying CSRs for eligible individuals. 42 U.S.C. § 18031(b)-(e); 45 C.F.R. §§ 155.1000-155.1010, 156.20, 156.200.

The Administration's decision makes those tasks substantially more complicated and expensive. While rate review and plan selection take place between May and October, *see* Wick, *supra*; CMS Bulletin 2-4, Congress typically does not make appropriations decisions until October or later. The Administration's conclusion that CSRs are subject to an annual appropriations process would require regulators to evaluate proposed premiums, and select plans for inclusion in Exchanges, without knowing whether insurers would receive federal CSR payments. That would make it "more difficult and onerous" for regulators to determine appropriate premiums and to ensure adequate insurer participation on Exchanges. *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004); *see also* Wade Decl. ¶¶ 2-10; Navarro Decl. ¶¶ 4-10; Vullo Decl. ¶¶ 10-13.

At the very least, the Administration's decision will make these tasks more expensive. Regulators typically review only one proposed premium rate per plan year. Thomas Decl. ¶ 12. If the Administration's decision is allowed to take effect, regulators would either have to review two premium proposals or Exchange applications—one assuming CSRs will be reimbursed and one not—or establish processes for modifying premiums or changing participation after the review and selection process has begun. In either scenario, the States would spend more. *See* Wade Declaration ¶ 18; Thomas Decl. ¶ 12; Vullo Decl. ¶ 12. Courts have held that a plaintiff has standing based on substantially less harm. *See Ass'n of Private Sector Colls. and Univs. v. Duncan*, 681 F.3d 427, 458 (D.C. Cir. 2012) (standing where regulation would impose "'greater compliance costs,'" even though costs would not be "'significant'"); *Kansas v. United States*, 16

F.3d 436, 439 (D.C. Cir. 1994) (standing to challenge federal limit on direct flights to airport where state employees "occasionally" flew to city, and more flights to airport 12 miles closer to town would permit transfers from airport to city that "presumably would take less time and cost Kansas somewhat less").

Indeed, the Administration's decision to reverse course has already interfered with the States' regulatory decisions, and forced them to incur additional costs. Because the Administration refused to commit to continue making CSR payments throughout 2017, States altered their regulatory programs, and spent additional tax dollars, in an effort to accommodate that uncertainty. *See* Wade Declaration ¶¶ 12-21; Thomas Decl. ¶ 13. And the Administration's announcement has forced several States to reevaluate whether previously approved premium rates comply with the relevant statutory criteria, and spend even more money to restructure their regulatory apparatuses. *See* Redmer Decl. ¶¶ 13-17; MacEwan Decl. ¶ 17; Cammarata Decl. ¶ 25.

Defendants' argument that the States fall outside the "zone of interests" protected by the CSR provisions is similarly unavailing. Opp. 13. The "zone of interests" requirement under the Administrative Procedure Act (APA) is a "lenient" test under which "the benefit of any doubt goes to the plaintiff." *Lenmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014). Here, the States operate health insurance Exchanges that depend on the stable and guaranteed funding of CSR payments to function properly, and the States will incur significant financial costs from the increase in uninsured residents if CSR payments are not funded. McLeod Decl. ¶¶ 7-9; Wadleigh Decl. ¶ 16; Rattay Decl. ¶¶ 4-6; de la Rocha Letter 1-2; CBO Report 7. The States are within the "zone of interests" protected by CSRs.

Finally, Defendants are incorrect that principles of *parens patriae* do not support the States' standing here. Opp. 14. The Administration's decision will substantially injure the States' quasi-sovereign interest in the health and well-being of their residents. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,* 458 U.S. 592, 600, 607-608 (1982). And while the law generally disfavors *parens patriae* standing in suits that seek "'to protect [state] citizens from the operation of federal statutes,'" *Massachusetts*, 549 U.S. at 520 n.17, this is not such a case. The States

instead seek to *defend* a federal statute and thereby "'vindicate the Congressional will.'" *Abrams v. Heckler*, 582 F. Supp. 1155, 1159 (S.D.N.Y. 1984).

II. THE STATES AND THEIR RESIDENTS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF

The States and their residents will suffer imminent irreparable harm absent immediate injunctive relief because the halting of CSR payments will cause tremendous chaos, uncertainty, and confusion in the health care markets just before open enrollment commences on November 1, 2017. Mot. 16-23. Indeed, President Trump has not just acknowledged but bragged about these harms, making clear that his core reason for cutting off CSR funding is to "explode," "dismantle[]," and "finish[]" the ACA. Mot. 2-3 & fns. 1-4.

Notwithstanding the President's admissions, Defendants contend that the harms caused by terminating CSR payments cannot support injunctive relief because these harms do not sufficiently affect the States, but only their residents. Opp. 25. That is incorrect. The harms at issue here directly affect the States, requiring them to expend additional money to care for an increasing population of uninsured residents, McLeod Decl. ¶¶ 7-9; Wadleigh Decl. ¶ 16; Rattay Decl. ¶¶ 4-6; de la Rocha Letter 1-2; CBO Report 7; Wynn Decl. ¶ 6, and also to administer a large and complex health insurance system without knowing until the last minute whether, or for how long, the crucial CSR component will be funded, Thomas Decl. ¶ 13. Further, because this case involves patients' access to health care coverage, harms to state residents who will lose their health insurance or face higher costs provide an independent basis for injunctive relief. "[A]lthough harm to third parties is generally not relevant, in cases involving Medicare and similar health care programs, courts have routinely considered and granted injunctive relief based on the potential harm to patients." *Sharp Healthcare v. Leavitt*, 2008 WL 962628, at *5 (S.D. Cal. 2008) (citing cases).

Defendants' assertion that the irreparable harms are "speculative" is incorrect. Opp. 25-27. Numerous health care experts have concluded that these harms—such as rising premiums, insurers leaving the markets, and an increase in uninsured—are virtually certain to occur. Cantwell Decl. ¶ 2; Bertko Decl. ¶¶ 6, 7; McLeod Decl. ¶¶ 2, 5, 6; Thomas Decl. ¶ 11; Reyes

Decl. ¶ 10; Fescatore Decl. ¶ 23; Wade Decl. ¶ 15; Corlette Decl. ¶¶ 6-7. And those harms in fact have already occurred in numerous places, where insurers have already raised their rates or dropped out of the Exchanges specifically because of the uncertainty concerning whether CSRs would be paid. *See* Mot. 20.

Defendants assert that there is no risk of an imminent increase in premiums for 2017. Opp. 25. That is a red herring. While the harms caused by terminating CSR payments in 2017 will occur primarily in 2018 and 2019, those harms will become certain, and irreparable, as soon as the CSR payments are cut off in 2017. Many insurers will raise rates for 2018 and/or 2019 to recoup their 2017 losses and anticipated 2018 shortfall, and others will simply exit the markets due to the uncertainty and instability caused by the termination of CSR payments. Bertko Decl. ¶ 6; McLeod Decl. ¶¶ 2, 5; Thomas Decl. ¶ 11; Reyes Decl. ¶ 10; Fresacatore Decl. ¶ 23; Wade Decl. ¶ 15; Eyles Decl., ¶¶ 9, 17; Jones Decl. ¶ 10; Kreidler Decl. ¶¶ 25-26. Further, the chaos caused by disrupting CSRs at the present time will directly affect consumer enrollment for 2018, as the open enrollment period begins on November 1, 2017, and consumers will be faced with tremendous uncertainty in attempting to select a plan. Redmer Decl. ¶¶ 4-18; Gasteier Decl. ¶¶ 11,14; Reyes Decl. ¶ 6; McLeod Decl. ¶¶ 5-9; MacEwan Decl. ¶ 12; Kempski Decl. ¶ 6; Jones Decl. ¶ 3; Cammarata Decl. ¶ 22; Frescatore Decl. ¶¶ 21, 33.

Defendants note that many States and insurers already accounted for the absence of CSR payments in setting premiums for 2018. Opp. 26. But many have not, and insurers in those markets will need to raise their rates or suffer losses, and many insurers are likely to exit those markets. Redmer Decl. ¶¶ 9, 13; Eyles Decl. ¶¶ 9, 12, 17; Cammarata Decl. ¶¶ 13, 19, 20; Maranjian Decl. ¶¶ 7-12; MacEwan Decl. ¶¶ 7-10; Corlette Decl. ¶ 6; Reyes Decl. ¶ 10; Jones Decl. ¶ 10; Kreidler Decl. ¶¶ 25-26; Greene Decl. ¶ 5; Burrell Decl. ¶¶ 7-9. Further, in States that already authorized higher rates in anticipation of the lack of CSR funding, the termination of CSR payments will lock in those higher rates—and thereby harm consumers—and preclude those States from being able to reduce premiums on their Exchanges, which many would seek to do if CSR payments were guaranteed. Second MacEwan Decl. ¶ 6; Second Keen Decl. ¶ 4.

Also unavailing is Defendants' argument that the States have not identified insurers that are "imminently planning" to exit the exchanges. Opp. 26. The States have provided extensive evidence that insurers have already left numerous markets specifically because of the uncertainty concerning CSR payments—for example, Anthem cited CSR uncertainty in explaining its decision to withdraw from the Exchanges in Wisconsin, Indiana, and Ohio, and to stop offering plans in 16 of California's 19 insurance regions, Mot. 20, n.35, and two Aetna insurers withdrew from Delaware's Exchange based in part on the uncertainty about CSR reimbursements in 2018, Navarro Decl. ¶ 13. Experts predict that many other insurers are likely to exit the Exchanges if the CSR payments are in fact terminated. Reyes Decl. ¶ 10; Eyles Decl. ¶¶ 9, 17; Corlette Decl. ¶ 6; Jones Decl. ¶ 10; Kreidler Decl. ¶¶ 25-26. Preliminary injunctive relief would bring much needed stability to these markets, and dramatically reduce the likelihood of insurers dropping out. Plaintiffs' evidence is sufficient to meet their burden of establishing harm.

Defendants also point out that if CSR payments cease, premium tax credits will rise because they are indexed to premiums for "silver" plans, and those premiums will rise if CSR payments are not made. Opp. 26-27. While that is true (and confirms that the federal government will *save* money on net if it continues to pay CSRs), it does not cure the irreparable harm caused by defunding CSRs. Terminating CSRs and increasing premium tax credits would simply redistribute ACA funding, benefitting some recipients while harming others, all in a manner that Congress did not intend. And the fact that some consumers would benefit does not change the fact that a significant number of consumers would be harmed—most notably, those who purchase insurance on the Exchanges but do not qualify for premium tax credits. Mot. 18-19 & n.32. Nor does it change the fact that eliminating CSRs would cause chaos in the markets as insurers scramble to determine whether to raise their rates or exit the market, and consumers scramble to determine what plans are available, and at what price—all of which will lead to more consumers choosing, or being forced, to forgo insurance entirely or buy less comprehensive, but cheaper, plans. Reyes Decl. ¶ 6; McLeod Decl. ¶¶ 5-9; MacEwan Decl. ¶ 12; Redmer Decl. ¶¶ 10-15; Kempski Decl. ¶ 6; Jones Decl. ¶¶ 3, 5; Cammarata Decl. ¶ 22; Frescatore Decl. ¶¶ 21, 33; Gasteier Decl. ¶¶ 21-22.

Similarly, Defendants claim there is no evidence that the number of uninsured will increase immediately as a result of the cessation of CSR payments. Opp. 27. To the contrary, the CBO report estimates that *one million* more Americans will be uninsured in 2018 of CSRs nonpayment. CBO Report 7, see also Mot. 18-19, 20-21. That result begins immediately, as open enrollment for 2018 starts in a matter of days. Defendants argue that the deadline has already passed for altering rates for 2018 plans, but that *exacerbates* the harm, rather than mitigating it. As noted above, if States cannot change premium rates, many insurers will be undercompensated, which will cause some insurers to exit the markets. And many States will seek to allow insurers to raise their premium rates anyway, which will negatively affect consumers and create confusion during the crucial open enrollment period. If CSR payments stop now, there are no good options.

Defendants also claim that a preliminary injunction would not give States the certainty that they need. Opp. 27. But the fact that injunctive relief might not completely or permanently resolve the problem created by Defendants is not a reason to deny injunctive relief; as long as the remedy can help mitigate the irreparable harm—and it here it certainly will—injunctive relief is necessary and appropriate.

Defendants also contend that they are not required to make monthly payments, but only "periodic and timely" payments. Opp. 27-28. Of course, if Defendants guaranteed that CSRs would be paid, but said they would pay them on a different timetable, that would raise a different set of issues, and might or might not violate the "periodic and timely requirement" under 42 U.S.C. § 18071(c)(3)(a). But that is not what Defendants have done here: they have cut off CSR payments completely, and that is legally improper and will cause irreparable harm.

Finally, Defendants note that these preliminary injunction issues are being decided "on the basis of one week of litigation," and ask for additional time for a "reasonable briefing schedule." Opp. 28. But the short litigation schedule is entirely Defendants' own creation: they chose to abruptly announce that they would not make the October 2017 CSR payments late in the day on October 12, 2017, just eight days before Defendants' had scheduled payment, and just a few weeks before the start of open enrollment. Having unilaterally created the emergency that necessitates preliminary injunctive relief, Defendants cannot be heard to complain that their time

to respond is too short.

III. THE BALANCE OF EQUITIES TIPS SHARPLY IN FAVOR OF THE PLAINTIFF STATES AND A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST AND WILL PRESERVE THE STATUS QUO

The balance of equities and public interest strongly favor a preliminary injunction that preserves the status quo and enjoins the Executive Branch from abruptly terminating cost-sharing reduction payments, which would destabilize the health insurance markets, cause large premium increases, increase the number of uninsured, and significantly raise uncompensated care costs that are ultimately borne by the States. Mot. 23-24.

Defendants contend that a preliminary injunction would not preserve the status quo. Opp. 28. That is incorrect. The status quo here is the continued payment of CSR reimbursements, which the Executive Branch has paid monthly since the inception of the CSR program, including for the past eight months under the current Administration, and which are integral to the stability of the ACA's Exchanges. The Executive Branch's abrupt change of position, announced just nine days ago, does not create a new "status quo." "The status quo ante litem refers not simply to any situation before the filing of a lawsuit, but instead to 'the last *uncontested* status which preceded the pending controversy.'" *GoTo.Com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (emphasis added) (quoting *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963)). In any event, "[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury.... The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Golden Gate Restaurant Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008) (citation omitted).

Defendants also argue that other remedies are available, such as an order for the United States to make back payments to insurers if Plaintiffs ultimately prevail, or the possibility that insurers could recover CSR payments from the federal government in the Court of Federal Claims pursuant to the Tucker Act. Opp. 28-31. But none of these remedies would relieve the immediate and irreparable disruption to the health care system, with the resulting increase in the number of uninsured, that will occur if CSR payments are abruptly cut off now. Such a system

would leave the Exchanges in an untenable bind: To maintain lower premiums, the States would have to require insurers to incur significant CSR losses up front, with a vague promise that they might (or might not—Defendants will surely contest any such claims) be compensated at some unspecified (much) later date if they bring a successful lawsuit under the Tucker Act, or if the States ultimately prevail in this lawsuit. Alternatively, the States would have to allow insurers to raise premiums to account for the lack of CSR reimbursements, with consequent harms to consumers. Neither of these options is equitable or in the public interest.

Indeed, Defendants' "equitable" arguments completely ignore the essential equitable issue—the tremendous and irreparable disruption to the health care system that abruptly cutting off CSR payments will cause. Plaintiffs seek to preserve the status quo pending resolution of this action, which will allow many more people to maintain affordable health care coverage and save the federal government money on net. Defendants seek to abruptly terminate an essential piece of the ACA's integrated affordable health care system, which will cause a tremendous number of people to lose their health care coverage and cost the federal government more money on net. The equities and public interest tip overwhelmingly in favor of a preliminary injunction.

IV. THE COURT SHOULD ISSUE A PRELIMINARY INJUNCTION

The Court should treat the pending motion as one for preliminary injunction. First, the parties have fully briefed the merits. Additional evidence and argument before this Court is not necessary for the Court to rule on the issue presented. Moreover, the Plaintiff States' request for a temporary restraining order has expired because it requested relief from the Court by Thursday, October 19, 2017 at 4:00 p.m. As open enrollment begins on November 1, 2017, relief from the Court to continue the payments is necessary for stability, and to avoid the chaos, uncertainty, and confusion created by the Defendants' precipitous declaration of nonpayment. In order to alleviate that harm, relief more durable than a temporary restraining order is needed. Finally, in the event that either party would like to seek review of the Court's order, a preliminary injunction order provides a cleaner procedural vehicle for review, which is in everyone's interest.

CONCLUSION

The Court should grant Plaintiffs' request for a preliminary injunction.

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